

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL

# 75-7677,7681

---

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

---

RANDOLPH PHILLIPS,  
*Plaintiff-Appellee,*

v.

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each  
in their own capacity as directors of Alleghany Corporation, and as attorneys for and guardians of the property of Allan P. Kirby, Sr., JOHN J. BURNS, JR.,  
*Defendants-Appellants,*

RALPH K. GOTTSCHALL, RICHARD R. HOUGH, WILLIAM G. RABE,  
CLIFFORD H. RAMSDELL, and CARLOS J. ROUTH, as directors of Alleghany Corporation,  
*Defendants,*  
and ALLEGHANY CORPORATION,  
*Defendant-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

---

**BRIEF OF**  
**JOHN E. TOBIN, FRED M. KIRBY, ALLAN P.**  
**KIRBY, JR. AND JOHN J. BURNS, JR.**

---

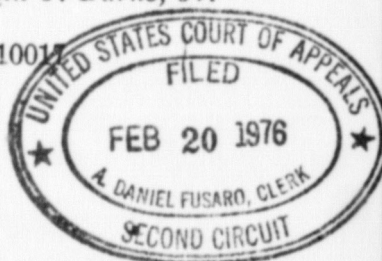
DEBEVOISE, PLIMPTON, LYONS & GATES  
*Attorneys for Defendants-Appellants*  
*John E. Tobin, Fred M. Kirby, Allan*  
*P. Kirby, Jr. and John J. Burns, Jr.*  
299 Park Avenue  
New York, New York 10017  
752-6400

*Of Counsel:*

SAMUEL E. GATES  
ROBERT J. GENIESSE

February 20, 1976

---



2



IN THE  
**United States Court of Appeals**

FOR THE SECOND CIRCUIT

Nos. 75-7677, 75-7681

---

RANDOLPH PHILLIPS,

*Plaintiff-Appellee,*

v.

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each  
in their own capacity as directors of Alleghany Corpo-  
ration, and as attorneys for and guardians of the prop-  
erty of Allan P. Kirby, Sr., JOHN J. BURNS, JR.,

*Defendants-Appellants,*

RALPH K. GOTTSHALL, RICHARD R. HOUGH, WILLIAM G. RABE,  
CLIFFORD H. RAMSDELL, and CARLOS J. ROUTH, as direc-  
tors of Alleghany Corporation,

*Defendants,*

and ALLEGHANY CORPORATION,

*Defendant-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF OF  
INDIVIDUAL DEFENDANTS-APPELLANTS,  
JOHN E. TOBIN, FRED M. KIRBY, ALLAN P.  
KIRBY, JR. AND JOHN J. BURNS, JR.**

This Brief is submitted on behalf of the individual de-  
fendants-appellants in support of their appeal, Docket No.  
75-7681, pursuant to 28 U.S.C. § 1291 (1970). This appeal

is taken from those portions of an opinion and order of the United States District Court for the Southern District of New York, by the Honorable Robert J. Ward, dated November 5, 1975, which denied their motion, and that of Alleghany Corporation, to dismiss the amended complaint on either of two grounds: First, that Mr. Phillips, the plaintiff *pro se*, who is not an attorney, cannot prosecute *pro se* a derivative action on behalf of Alleghany and, second, that Mr. Phillips is not an adequate representative plaintiff under Rule 23.1 of the Federal Rules of Civil Procedure. In Docket No. 75-7677, Alleghany Corporation has raised the same two issues on appeal.

On January 20, 1976, Judge Ward denied, without opinion, motions by the individual defendants and Alleghany for reargument and clarification of aspects of the November 5 decision that are not involved in this appeal. To avoid any argument concerning which of Judge Ward's orders is the proper subject of appeal, the individual defendants and Alleghany filed on February 6, 1976, Notices of Appeal from the orders of November 5 and January 20, and raised the same issues already specified in their prior Notices of Appeal. This appeal by the individual defendants has been assigned Docket No. 76-7045 and Alleghany's appeal has been assigned Docket No. 76-704. The individual defendants and Alleghany have moved for consolidation of all four of the substantively identical appeals.

In accordance with Rule 28(i), Fed. R. App. P., and in order to avoid duplication, we adopt *in toto* by reference the arguments contained in Alleghany's Brief in support of its appeal.

### CONCLUSION

Accordingly, it is respectfully submitted that so much of Judge Ward's order as is the subject of these appeals should be reversed and the case should be remanded to the District Court with instructions to dismiss all of Mr. Phillips' derivative claims and to take such other and further action as that Court deems appropriate in light of this Court's mandate.

Dated: New York, New York  
February 20, 1976

Respectfully submitted,

DEBEVOISE, PLIMPTON, LYONS & GATES  
*Attorneys for Defendants-Appellants*  
*John E. Tobin, Fred M. Kirby, Allan*  
*P. Kirby, Jr. and John J. Burns, Jr.*  
299 Park Avenue  
New York, New York 10017  
752-6400

*Of Counsel:*

SAMUEL E. GATES  
ROBERT J. GENIESSE

AFFIDAVIT OF SERVICE

STATE OF NEW YORK     )  
                              :   ss.:  
COUNTY OF NEW YORK    )

ROBERT BELLUSCIO, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 20th day of February, 1976, I served two copies of the annexed Brief upon:

Mr. Randolph Phillips  
30 East 72nd Street  
New York, New York 10021

by depositing true and correct copies thereof in the letter drop maintained by the United States Postal Service at 80 Pine Street, New York, New York 10005, enclosed in a stamped, sealed envelope addressed to the above-mentioned party at the above-mentioned address.

*Robert Belluscio*

Sworn to before me this  
20th day of February, 1976

*Robert R. Cawthra Jr.*  
Notary Public

ROBERT R. CAWTHRA, JR.  
Notary Public, State of New York  
No. 31-0-0110  
Qualified in New York County  
Commission Expires March 20, 1977

COPY RECEIVED

FEB 2 1973

CAHILL GORDON & REINDEL

Attorneys for *Alleghany Corporation*